

Southland Containers, Inc. and United Paperworkers International Union, AFL-CIO, Petitioner. Case 15-RC-7726

October 18, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered objections to an election held on December 18, 1992, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 17 for and 15 against the Petitioner, with 2 challenged ballots.¹

The Board has reviewed the record in light of the exceptions and brief and adopts the Regional Director's findings and recommendations.

In its Objection 7, the Employer alleged that employees interfered with the election by "prepar[ing] a list of employees who went to vote and [keeping] a tally regarding each employee's voting status." The Employer presented three witnesses to support this objection. Witness A stated that on the day of the election, he and employee B kept a list of how the vote would turn out. Employee B stated that shortly before the election employee A showed him a list of employees, by department, with notations of how A thought they would vote. Employee B put the list in his pocket, later examined it, and returned it to A. Witness C stated that immediately after the polls opened, he went to A's machine where A was holding a piece of paper. Employee C declared that A asked him how he planned to vote, and said that he was keeping a list to see who was voting "Yes" and "No." Employee C walked away without seeing the paper or responding.

The Regional Director found no evidence that employees A or B were agents of the Petitioner. He therefore considered the allegations under the third-party standard and found no general atmosphere of fear and reprisal had been created, rendering a free election im-

possible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Accordingly, the Regional Director recommended overruling this objection.

The Employer excepts, arguing that it is the Board's policy to prohibit anyone—including nonagent employees—from keeping voting lists during elections. *Belk's Department Store*, 98 NLRB 280 (1952). For the following reasons, as well as those relied on by the Regional Director, we find that this exception lacks merit.

Although the Board, in general, finds keeping any voting list other than the official *Excelsior* list to be objectionable, "list keeping" is a basis for a new election only when it can be shown or inferred from the circumstances that employees knew their names were being recorded. *Piggly-Wiggly #011*, 168 NLRB 792 (1967). It has not been established that employee A was keeping a list of employees who had voted. Assuming arguendo that employee A kept a list of who had voted, and used it in connection with his predictions of the outcome of the election, the evidence shows that only one or two employees were aware of this fact. In these circumstances, any list keeping here would not be sufficient to warrant a new election. *Robert's Tours*, 244 NLRB 818 fn. 1 (1979); *Tom Brown Drilling Co.*, 172 NLRB 1267 (1968).

DIRECTION

Case 15-RC-7726 is remanded to the Regional Director for Region 15. The Regional Director shall commingle and open the ballots of Richard Patterson and Eric Gross. The Regional Director shall determine if either of these ballots is cast for the Petitioner. If so, and without issuing a revised tally of ballots, the Regional Director shall certify the Petitioner. If, however, both ballots are cast against the Petitioner, the issue of alleged discriminatee Gross' eligibility shall be consolidated with the hearing scheduled in Cases 15-CA-11973, 15-CA-12023, and 15-CA-12023-2. If Gross is found to have been lawfully terminated and thus ineligible to vote, the Regional Director shall certify the Petitioner. If, however, Gross, having voted against the Petitioner, is found to have been unlawfully terminated and thus eligible to vote, the Regional Director shall certify the results of the election.

¹ There is no exception to the Regional Director's recommendation to count the challenged ballots.